

2-1-1935

Real Property -- Status of Proceeds of Sale of Real Estate Held by the Entirety

Robert Booth

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Robert Booth, *Real Property -- Status of Proceeds of Sale of Real Estate Held by the Entirety*, 13 N.C. L. REV. 256 (1935).

Available at: <http://scholarship.law.unc.edu/nclr/vol13/iss2/22>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

of action, the court allows proof of the plaintiff's negligence.⁸ Chief Justice Stacy carefully avoids use of the term "contributory negligence" which would be an affirmative defense in bar,⁹ but in a previous decision by the same jurist, the definition given would so characterize the present defense.¹⁰ The effect of this decision is that the negligence of plaintiff and defendant are compared to arrive at the proper damages.¹¹ The rule applied where judgment is on a verdict of the jury, that contributory negligence must be pleaded and that it bars the plaintiff's action,¹² is abandoned. Will the decision therefore foster a new body of law which dispenses with the necessity of giving plaintiff notice of defenses by pleading them, and to be applied or ignored in the discretion of the court? That implication necessarily follows, for in the absence of a consistent line of authority the trial judge must use his own notion of justice in deciding whether a particular defense, affirmative or not, relates to the question of damages.

The limitation on the defendant's time for pleading, obviously necessary to insure trial of the case, occasions no hardship which calls for the instant ruling; for even after judgment has been rendered, he may have the case reopened for excusable neglect. Grounds therefor are specified by statute.¹³ Thus it is difficult to see why the North Carolina court must depart from logic and precedent to give the defendant additional advantages on the inquiry.

MAURICE V. BARNHILL, JR.

Real Property—Status of Proceeds of Sale of Real Estate Held by the Entirety.

Husband and wife sold real estate of which they were seised by the entirety. The husband took the money thus received and placed it

⁸ *DeHoff v. Black*, 206 N. C. 687, 690, 175 S. E. 179, 181 (1934). In illustrating, Judge Stacy says, "Upon execution of the inquiry, B offers to show how the accident occurs, not to escape his liability of a penny and costs established by the judgment, but to show that A's damages, over and above the amount fixed by the default judgment, was the result of a self-inflicted injury (not contributory negligence). . . ."

⁹ *West Construction Co. v. Atlantic Coast Line R. R.*, 184 N. C. 179, 113 S. E. 672 (1922).

¹⁰ *West Construction Co. v. Atlantic Coast Line R. R. Co.*, 184 N. C. 179, 113 S. E. 672 (1922).

¹¹ The doctrine of comparative negligence has not heretofore been recognized in this state except in cases coming within the Federal Employers' Liability Act, and our own statute, N. C. CODE ANN. (Michie, 1931) §3467, which relates to actions by employees against common carriers; *Moore v. Chicago Bridge & Iron Works*, 183 N. C. 438, 111 S. E. 776 (1922).

¹² N. C. CODE ANN. (Michie, 1931) §523.

¹³ N. C. CODE ANN. (Michie, 1931) §600; the statute declares that the judge shall relieve the defaulting party where there has been "mistake, inadvertence, surprise, or excusable neglect."

in a bank to his credit. On his death the widow claimed all by virtue of survivorship and secured a judgment against the estate for the full amount. Pending an appeal from this judgment the bank became insolvent. The appeal having been abandoned and the personalty proving inadequate, the widow now petitions for sale of the decedent's real estate to make assets to pay her judgment. *Held*, the estate holds the entire amount of the money as trustee for her and she as a creditor is entitled to the sale.¹

Upon conversion, by sale or otherwise, of realty held by the entirety² into other forms of property, what status do these new assets assume? This question is important for it ultimately determines: (1) The right of survivorship, since there must be an estate by the entirety for such right to exist.³ (2) Rights of the creditors of the individual spouse, since as long as the estate by the entirety exists these creditors have no valid claim on the assets.⁴ (3) Right of each individual spouse to do with his part as he pleases, for this is possible, only where no estate by the entirety exists.⁵

At common law this problem in its present-day form did not exist, for once the realty was turned into personalty the husband was the absolute owner thereof.⁶ Many states today recognize estates by the entireties in personalty of any character;⁷ others recognize such estates in personalty consisting of proceeds received from the sale of realty thus held.⁸ In the latter jurisdictions the courts say that an estate by the entireties existed in the realty, and that the proceeds received therefrom should stand in the place of the realty and should also be held by the entireties⁹ until a division by the parties is had.¹⁰ Accordingly, estates by the entireties have been held to exist in assets such as

¹ *Place v. Place*, 206 N. C. 676, 174 S. E. 747 (1934).

² This problem would arise only in those states that recognize estates by the entireties in realty: Ark., Ind., Mich., Mo., N. Y., N. C., Ore., Pa., S. C., Tenn., and Vt. POWELL, *CASES ON POSSESSORY ESTATES* (1st ed. 1933) 290, n. 4.

³ Survivorship is generally abolished in joint tenancies by statutes. N. C. CODE ANN. (Michie, 1931) §1735.

⁴ *Patton v. Rankin*, 68 Ind. 245, 34 Am. St. Rep. 254 (1879). For the rights of creditors generally in estates by the entireties see *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180 (1924); *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924). But see *Hiles v. Fisher*, 144 N. Y. 312, 39 N. E. 337 (1895).

⁵ *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790 (1891); *Jones v. Smith*, 149 N. C. 318, 62 S. E. 1092 (1908).

⁶ 2 KENT COMM. 143; *Gooch v. Weldon Bank & Trust Co.*, 176 N. C. 213; 97 S. E. 53 (1918).

⁷ *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925); *Brewer v. Bowersox*, 92 Md. 567, 48 Atl. 1060 (1901); Note (1920) 8 A. L. R. 1017. *Contra*: *Winchester-Simmons Co. v. Cutler*, 194 N. C. 698, 140 S. E. 622 (1927).

⁸ *Koehring v. Bowman*, 194 Ind. 433, 142 N. E. 117 (1924).

⁹ *In re Blumenthal's estate*, 119 Misc. Rep. 588, 196 N. Y. S. 764 (1922); *Citizen's Sav. Bank and Trust Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250 (1916).

¹⁰ *Brell v. Brell*, 143 Md. 443, 122 Atl. 635 (1923).

bonds and purchase-money mortgages,¹¹ undivided money from the sale of the land,¹² money from the sale of lumber cut from the realty,¹³ money received from insurance of the premises,¹⁴ money from the sale of realty which was later invested in business,¹⁵ money from the sale of real estate which was later used to purchase more realty in the husband's name,¹⁶ money borrowed on realty held by the entireties,¹⁷ and surplus money accruing from the sale under a mortgage foreclosure of land held by the entirety,¹⁸ A minority take the position that the estate by the entirety is undesirable because it is contrary to the policy expressed by the Married Women's Acts,¹⁹ defeats a general policy against survivorship,²⁰ and exempts property from the debts of the individual spouse;²¹ therefore these courts refuse to recognize estates by the entireties in personalty even where such is derived from the conversion of realty held by the entireties. Following this reasoning, estates by the entireties have been held not to exist in bonds and purchase-money mortgages,²² undivided money from the sale of realty,²³ and a note given to the husband and wife secured by a mortgage on realty owned by a third party.²⁴

The North Carolina Court in the instant case holds that an estate by the entirety exists in money received from the sale of realty. In the earlier case of *Moore v. Trust Co.*²⁵ money received from the sale of realty held by the entirety was divided and placed in two different banks to the credit of the wife. The Court held that no estate by the entirety existed in money thus divided, but refused to commit itself as to the status of the money had it not been divided. However, Justice Clark in a concurring opinion held that when the land was turned into money the estate by the entirety ceased. In a case four years later the Court probably answered the question left open in the above case when in *Turlington v. Lucas*,²⁶ where the husband and wife conveyed to a third party realty held by the entirety and in return received bonds secured

¹¹ *Boland v. McKowen*, 189 Mass. 563, 76 N. E. 206 (1905); *Fielder v. Howard*, 99 Wis. 388, 75 N. W. 163 (1898).

¹² *Brell v. Brell*, 143 Md. 443, 122 Atl. 635 (1923).

¹³ *Morris v. Morris*, 210 Mich. 36, 177 N. W. 266 (1920).

¹⁴ *Masterman v. Masterman*, 129 Md. 167, 98 Atl. 537 (1916).

¹⁵ *George v. Dutton*, 94 Vt. 76, 108 Atl. 515 (1920).

¹⁶ *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527 (1906).

¹⁷ *Union and Mercantile Trust Co. v. Hudson*, 147 Ark. 7, 227 S. W. 1 (1921).

¹⁸ *Hill Top Savings and Trust Co. v. Worley*, 16 Pa. Dist. 250 (1906).

¹⁹ *In re Albrecht's Estate*, 136 N. Y. 91, 32 N. E. 632 (1892).

²⁰ *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923).

²¹ *Gooch v. Weldon Bank & Trust Co.*, 176 N. C. 213, 97 S. E. 53 (1918).

²² *Central Trust Co. v. Street*, 95 N. J. Eq. 278, 127 Atl. 82 (1923).

²³ *Bremer v. Luff*, 7 F. Supp. 148 (N. D. N. Y. 1934).

²⁴ *Stout v. Van Zante*, 109 Ore. 430, 219 Pac. 804 (1923).

²⁵ *Moore v. Trust Co.*, 178 N. C. 118, 100 S. E. 269 (1919).

²⁶ *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923).

by a deed of trust, it held that an estate by the entirety did not exist in those bonds since they were personalty and no estates by the entirety existed in personalty in North Carolina. It seems that this Court is willing to say that *money* received from the sale of the *realty* is held by the entireties while bonds thus received are not so held. It is doubtful if any satisfactory distinction can be made, since both are personalty and a bond "smacks" more of the realty than does money especially where the bond is secured by a deed of trust.

The Court in the principal case, clinging to the view that estates by the entireties exist in money received from the sale of realty so held, and intent on preserving the integrity of such estates, goes further and holds that a trust is set up in favor of the widow for the whole amount. Trusts, other than those expressly created by the parties, are usually declared by the courts (1) where an intent that one should arise is presumably inferable from the conduct of the parties, or (2) to prevent a wrongful enrichment.²⁷ It is suggested that in the present case a trust cannot be predicated on either of these two grounds. By holding that a trust exists the Court is giving the widow a preferred claim against the estate where the fund was dissipated through no fault of the husband or his administratrix. This result would work a hardship on the husband's bona fide creditors if the husband's estate should be found to be insolvent, since the widow's preferred claim would have to be settled in full before the creditors could receive anything.

A better result would have been reached by holding that the widow was a mere creditor of the estate to one half the amount. This would have carried out the probable intention of the parties as to a division of the fund. At the same time it would have obviated, as to the money, any further consideration of the undesirable legal consequences flowing from an estate by the entirety.

ROBERT BOOTH.

Sales—Passing Title to Part of Fungible Goods—What Constitutes Fungible Property.

The defendant company had stored in different warehouses 513,517 bags of beet sugar, each of the same standard and weight. During the year 1917 the defendant entered contracts for the sale of 190,374 bags, on which no payment was made before 1918, and which were not set apart from the other bags nor delivered until 1918. The Federal income tax upon the proceeds of these sales was computed as upon funds accruing in the fiscal year 1917. In 1925 on the contention that title did not pass to the vendees until delivery in 1918, and hence that the tax

²⁷ BOGERT, TRUSTS (1st. ed. 1921) 92; MATTLAND, EQUITY (1st. ed. 1920) 73.